In the Supreme Court of the United States

OCTOBER TERM, 1949

No. —

GERHART EISLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION TO DISMISS THE WRIT OF CERTIORARI

The Solicitor General moves that the writ of certiorari, heretofore granted to review this case, be now dismissed.

The facts pertinent to this motion appear in the opinions in *Eisler* v. *United States,* 338 U.S. 189, 190. Briefly stated, Eisler, having been convicted of a violation of R. S. 102 (2 U.S.C. 192) and his conviction having been affirmed by the Court of Appeals for the District of Columbia Circuit (170 F. 2d 273), petitioned this Court for a writ of certiorari, which was granted. 335 U.S. 857. Briefs

were filed and the case was argued orally, and thereafter, on May 6, 1949, before any decision was announced, Eisler fled the United States. On June 27, 1949, a majority of the Court, in passing upon a memorandum of the United States suggesting dismissal, ordered the cause "left off the docket until a direction to the contrary shall issue." 338 U.S. at p. 190.[1]

Since then, we are informed that Eisler has accepted public office in the Soviet Zone of Germany and otherwise given further evidences, if any were needed, of his intention to stay out of the jurisdiction of this Court. It is submitted that it is appropriate for this Court to issue the "direction to the contrary", mentioned in its prior opinion, dismissing the writ of certiorari.

Such action is indicated by the actual practice of this Court. The opinion of a majority of the Court, disposing of the memorandum filed by the United States, cited *Smith* v. *United States,* 94 U.S. 97, and *Bohanan* (*Bonahan*) v. *United States,* 125 U.S. 692,[2] as establishing the practice of the Court

---

[1] The Chief Justice and Mr. Justice Frankfurter dissented, believing that the writ should have been dismissed for lack of jurisdiction. 338 U.S. at pp. 190-193. Mr. Justice Murphy and Mr. Justice Jackson expressed, in separate dissenting opinions, the view that the case should have been decided on the merits. 338 U.S. at pp. 193, 195.

[2] Although the name of the plaintiff in error appears as "Bonahan" in the official report, examination of the Minutes of the Court for the 1887 Term reveals that his name was actually Bohanan. See Transcript of Records (1887) Vol. 16, p. 13417.

POOR COPY

BLEED THROUGH

in cases such as this. 338 U.S. at p. 190. The official report of the *Smith* case, which was said to establish the practice of the Court in this situation,[3] does not accurately disclose the nature and course of the proceedings therein, as appears from an examination of the Minutes and Docket of this Court. The *Smith* case is authority for *dismissal,* and for no other practice.

Smith was convicted of murder under the laws of the then territory of Washington and his conviction affirmed by the Supreme Court of that Territory. 1 Wash. Terr. Rep. 262. He thereupon sought and obtained from this Court a writ of error under the then applicable statutes and rules, and in the form then in use. R. S. (ed. 1873-1874) §§ 997, 999, 1003. See Robertson, *Appellate Practice and Procedure in the Supreme Court of the United States* (1928 ed.) pp. 94-102. A certified transcript of the record of Smith's trial was filed in the office of the Clerk of this Court as No. 453 of the December Term, 1870. Thereafter, while decision on the writ of error was pending, Smith escaped from custody.[4] The Minutes of the Court for the year 1876 show

---

[3] The Court in the *Bohanan* case simply followed the precedent supposedly established by the *Smith* case. 125 U.S. at p. 692.

[4] The precise date of Smith's escape does not appear either in the opinion of Chief Justice Waite or in the Minutes of the Court. The Attorney General of the State of Washington states, by letter dated August 4, 1949, that diligent search of the records of the State throws no further light on the details of Smith's evasion or his eventual fate.

that on October 10, 1876, the writ of error was dismissed. On November 20, 1876, however, on motion of Smith's counsel, the Court ordered that its judgment of October 10th be rescinded and the cause reinstated upon the docket. On November 27, 1876, the Court, per Chief Justice Waite, denied the motion of Smith's counsel to assign a day for argument and further "ordered that unless the plaintiff in error shall submit himself to the jurisdiction of the court below, on or before the 1st day of the next term of this Court, that the cause will be again *dismissed.*" (Italics supplied.) This is obviously the order which resulted from the opinion reported at 94 U.S. 97, and it is apparent that, while Chief Justice Waite, in his reported opinion, spoke of leaving the case off the docket after the deadline, the Court actually ordered the writ to be dismissed after such date. And this is conclusively confirmed by the Docket of the Court for the October Term, 1877, which shows that on October 9, 1877, which was at the beginning of the next term afer the opinion, the writ was "adjudged to be dismissed."

The fact is, therefore, that the *Smith* case was twice *dismissed* by this Court, and was not at any time merely left off the docket, as the opinion intimated would be done, unless, by the use of that phrase, the Court meant dismissal.

Since the petitioner has taken no steps to submit himself to the jurisdiction of this Court and

POOR COPY
BLEED THROUGH

has not evinced the slightest intention of so doing at any foreseeable time in the future, it is respectfully submitted that the Court should now follow the precedent established in the *Smith* case and dismiss the writ of certiorari heretofore granted in this case.

PHILIP B. PERLMAN,
Solicitor General.

OCTOBER, 1949.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1949 950040 193